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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT GLEN BILLING

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Thirty years ago in *Gordon* this Court ruled that activities regulated by the SEC and by self-regulatory organizations (in that case, commission rates) must be given antitrust immunity to the extent necessary to allow the securities laws to work as Congress intended. The same clash between securities regulation and antitrust has now arisen in a different area of securities activity—the structuring and negotiation of syndicated IPOs—and, as the SEC, NASD, and NYSE have made clear, the Second Circuit has forgotten the lesson this Court taught in *Gordon*, which other circuits have learned.

A syndicated IPO necessarily involves agreements among underwriting firms and discussions between underwriters and customers who may participate in the offering. The process is pervasively regulated, pursuant to statute, by the SEC and NASD. One objective of regulation is to preserve a fair field of competition, but a more fundamental goal is to promote an efficient capital-raising process that is the envy of the world. The issue in this case is whether the participants in that process must now anticipate that classes of disappointed investors will be able to ask antitrust juries for treble damages—which in this area of activity will always be massive—for actions that are subject to much more nuanced expert regulation.

Plaintiffs seek to open this new route to recovery because Congress in legislation such as the Private Securities Litigation Reform Act circumscribed the role of class actions in policing activities subject to the federal securities laws. The Second Circuit, the most important venue for this kind of case, has allowed plaintiffs to open that door, threatening every securities firm involved in a syndicated offering with massive antitrust liability. That threat, the SEC warns, will make avoiding treble damages liability under antitrust's competition-first rules the predominant consideration in the underwriting process, "overruling the Congressional regulatory regime" and discouraging conduct the SEC has concluded is beneficial to capital formation. Pet. App. 156a, 193a-197a; NASD Br. 11-13; 15 U.S.C. §§ 77b(b),

78w(a)(2). It is important to preserving American capital-raising processes and Congress's scheme for regulating them that this Court correct the Second Circuit's error.

1. Plaintiffs pretend (at 1-11, 22-23) that the Second Circuit correctly applied this Court's precedents. To be sure, the court of appeals recited that immunity is implied when there is "plain repugnancy between the antitrust and regulatory provisions," is "not favored," and is granted "to the minimum extent necessary." *Gordon*, 422 U.S. at 682-683. But its multi-factor test to determine whether repugnancy exists—which the Second Circuit applied rigidly but plaintiffs now say (at 7-8) is so "flexible" and "broad-ranging" that it provides market participants with no guidance at all—veers far from this Court's teachings. Indeed, plaintiffs *conceded* below that those factors could not be discerned from this Court's decisions. See Pet. App. 62a-63a.

Gordon refutes the Second Circuit's immunity test. Contrary to plaintiffs' argument (at 7-8), the Second Circuit's test *always* requires a showing that "Congress contemplated the *specific conflict* and intended for the antitrust laws to be repealed." Pet. App. 57a (emphasis added). *Gordon* required no such showing of express congressional intent, holding that immunity is necessary when there is a potential for conflict between the application of the antitrust laws and the regulatory regime governing the challenged activity. In *Gordon*—in which the SEC and Department of Justice took opposed positions as they have in this litigation—this Court implied immunity for fixed commission rates based on the SEC's broad statutory authority to regulate the subject, its active oversight of commission rates, and the risk of conflicting standards. The Court explained that "the sole aim of antitrust legislation is to protect competition," whereas the SEC must also consider "the economic health of the investors, the exchanges, and the securities industry." 422 U.S. at 685-689. Those factors support immunity here because the SEC and NASD extensively regulate all aspects of the IPO process, have

brought enforcement actions aimed at the alleged tie-ins and excessive commissions that plaintiffs challenge, have issued finely drawn guidance addressing what is permissible during bookbuilding, and have proposed pertinent rule changes. Pet. 6-9, 15-18. *Gordon*'s focus on whether "an antitrust suit would conflict with the operation of the regulatory scheme" cannot be reconciled with the Second Circuit's ruling. 422 U.S. at 688. As in *Gordon*, application of antitrust laws here would "render nugatory the legislative provision for regulatory agency supervision." *Id.* at 691.

As the district court found (Pet. App. 93a-120a) and the SEC confirmed (*id.* at 132a-139a), the SEC's power over the IPO process and the specific practices alleged here is at the heart of its regulatory authority. That power is at least as "pervasive" as the SEC's power over the NASD—a power also at issue in this case, see *id.* at 104a-110a, 138a-139a—which this Court held in *NASD* required implied immunity.

2. Plaintiffs try to dodge *Trinko*, but it confirms that under *Gordon* and *NASD* immunity is necessary when there is "the real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. *Trinko* explains that when "a regulatory structure designed to deter and remedy anticompetitive harm" like the securities laws is in place, "the additional benefit to competition provided by antitrust enforcement" is "small." *Id.* at 412. The costs, in contrast, are substantial. Superimposing the Sherman Act on top of a "detailed regulatory scheme" "distort[s] investment" as regulated businesses seek to avoid the "[m]istaken inferences" and "false condemnations" that inevitably result from jury determinations under the antitrust laws. *Id.* at 406, 414. And it adds another wasteful "layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by" aggrieved parties. *Id.* at 414; see also *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1514 (2006) ("parallel class actions" under distinct legal standards are "wasteful" and "duplicative"). The factors identified in *Trinko a fortiori*

support implied immunity here. See HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 237 (2005) (*Trinko* explains that if "antitrust will be particularly difficult to apply and prone to error, then it would likely do more harm than good in a well-regulated regime" that takes account of competition).

3. Plaintiffs' reliance on *Otter Tail* and *Philadelphia National* Bank (at 6-7) is misplaced. Neither case involved comprehensive legislation that protects the vital federal interest in public securities markets. See *Dabit*, 126 S. Ct. at 1509. Those decisions stand for the unremarkable proposition that limited regulatory authority by itself does not require immunity where the legislative record affirmatively demonstrates that Congress intended antitrust review to continue unimpeded. *Otter Tail*, 410 U.S. at 374-375 (describing Congress's "reject[ion of] a pervasive regulatory scheme" and "policy of maintaining competition to the maximum extent possible"); *Philadelphia Nat'l Bank*, 374 U.S. at 352 (legislative history "stated that the [Bank Merger] Act would not affect in any way the applicability of the antitrust laws").

Plaintiffs get no help either from *National Gerimedical*. There this Court held only that conduct having little connection to the regulatory scheme does not qualify for immunity—while recognizing that immunity must be implied when "necessary" to the exercise of regulators' "authorized powers." 452 U.S. at 393 n.18; see *id.* at 389-393 (challenged conduct was a "spontaneous response to the finding of [a private] advisory planning body" rendered when there was "no regulation" because "the regulatory aspects of the [law] were not in place"). *Silver* rejected implied immunity because the SEC lacked jurisdiction over the challenged conduct—but recognized that if the SEC had jurisdiction "a different case" would be presented. 373 U.S. at 357-361.

That plaintiffs can identify (at 12-14 & nn.7-9) antitrust suits that proceeded against securities market participants is irrelevant. 15 U.S.C. § 77p(a) and § 78bb(a) do not explain those decisions. Opp. 25. Those provisions are not antitrust

savings clauses and did not bar immunity in *NASD* or *Gordon*. The explanation is simpler. Mere overlap is no ground for immunity (Pet. App. 192a); the potential for conflict must make the antitrust laws repugnant to the securities regulatory scheme. In *NASDAQ Market Makers* the district court did not address immunity. In *Strobl* "the absence of conflict" was guaranteed because both laws "had the same goal and considered the same factors." *Friedman*, 313 F.3d at 800. In no case plaintiffs rely on did the SEC state that application of the antitrust laws would infringe its regulatory authority.

4. Plaintiffs' denial of any circuit conflict (at 25) consists of quotations showing that courts of appeals imply immunity when there is repugnancy between antitrust and the regulatory regime. But in applying that standard other courts of appeals give decisive weight to whether the SEC "exercises extensive oversight authority" over activities "envisioned to be fully dealt with under the securities acts" and focus on interference with the regulatory scheme created by Congress. *Austin Mun.*, 757 F.2d at 695; *Schaefer*, 509 F.2d at 1300; *Thill*, 633 F.2d at 69-70; *Harding*, 527 F.2d at 1370. Such inquiries faithfully address this Court's concern with the practical consequences of infringing the SEC's authority. *NASD*, 422 U.S. at 732, 735. Had any of those courts decided this case, it would have implied immunity.

5. Plaintiffs assert (at 11-21) that there is no repugnancy between the antitrust laws and securities laws because the conduct they allege is unlawful under both. In urging that immunity is necessary, however, the SEC assumed that defendants' conduct violated the securities laws. Pet. App. 129a n.2. Courts recognize that it may be necessary to imply immunity to protect a regulatory scheme even when the conduct challenged in an antitrust suit is unlawful under that scheme. By the time *Gordon* reached this Court the SEC had outlawed the fixed commission rates plaintiffs challenged as horizontal price fixing, yet this Court implied immunity. 422 U.S. at 682. In *Trinko* this Court recognized that had it not

been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good candidate for implication of antitrust immunity." 540 U.S. at 406. The conduct at issue was not "benign." Opp. 19. Verizon was alleged to have breached its statutory duty "to share its network with competitors." *Id.* at 401. An FCC investigation had resulted in Verizon entering into a consent decree and paying millions of dollars to the United States and competitors. *Id.* at 403-405. In *Schaefer* the court implied immunity from a claim that broker-dealers conspired to inflate the price of a stock. Though that scheme was unlawful under the Exchange Act and resulted in criminal convictions for conspirators, the court held the conduct immune because the "sort of manipulation scheme underlying" plaintiffs' antitrust claim "was envisioned to be fully dealt with under the securities acts." 509 F.2d at 1290-1291, 1299-1300.

6. Claiming (at 28-29) that "only relatively small conflict arises" from the possibility that in the future the SEC could permit tie-ins that are now unlawful, plaintiffs ignore the fact that *whether* particular conduct during an IPO is lawful or unlawful depends on nuanced distinctions drawn under securities law standards. Antitrust juries applying competition-first principles will not replicate securities regulators' expert judgments, creating conflict that makes implied immunity necessary here. Pet. App. 156a, 196a; NASD Br. 12-13; see *Brown* v. *Pro Football*, 518 U.S. at 242 (superimposing antitrust brings "instability and uncertainty" to the federal regulatory process, substituting "a web of detailed rules spun by many different nonexpert antitrust judges and juries" for the consistent rules, enforced by an "expert administrative body," envisaged by Congress).

The SEC has drawn fine lines that permit conversations between an underwriter and a potential IPO purchaser about the investor's aftermarket interest in the stock at various prices and intention to build a long-term position rather than "flip" the stock. Pet. App. 224a, 228a. Allowing lay antitrust

juries awarding treble damages to determine whether such conversations qualify as permissible bookbuilding inquiries or are instead illicit tie-in agreements will chill underwriters from making inquiries that the SEC recognizes are "essential" to the success of an IPO. *Id.* at 223a. The SEC has explained that its determination that such inquiries benefit the capital markets would be "supplanted" and its "ability to interpret, apply, and revise the governing law" based on "complex considerations of fact, law and policy" would be displaced by the need for underwriters to steer well clear of potential antitrust liability. *Id.* at 156a, 194a-196a; see NASD Br. 1, 8; Frank H. Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 127, 129-131 (Thomas Jorde & David Teece eds., 1992) (case-by-case jury inquiry, "certain to produce errors," forces firms to avoid "beneficial practices that create risks of condemnation" and carries "great potential to injure the economy by misunderstanding and condemning complex practices").

Whether a commission payment is lawful or unlawful under the securities laws is also a complex question. The difficulty of that inquiry and the need for securities expertise is illustrated by *Invemed Associates*. An NASD panel there determined, in a 94-page opinion following a 17-day evidentiary hearing, that higher-than-normal commissions on 700 transactions paid by customers seeking IPO allocations did not violate NASD rules. Observing that underwriters may properly give preference to good customers when allocating IPO shares, and that customers may lawfully seek "good customer" status by increasing order flow and commission payments, the panel engaged in a detailed factual inquiry into particular customer relationships and payments to determine whether that line had been crossed. There is no reason to expect that a lay antitrust jury faced with the same facts would reach the same result as NASD's expert panel. Market participants would accordingly have to curtail bookbuilding activities. The potential for such conflicting judgments about

the legality of conduct demands implied immunity. *Gordon*, 422 U.S. at 685-691.

The tie-in conduct plaintiffs allege is closely regulated by the SEC and NASD under a scheme that would be disrupted by these suits. But contrary to plaintiffs' protestation, this case is not just about tie-ins. The district court held that plaintiffs' conspiracy allegations—which lie at the core of their claims—mount "a theater-wide attack on the syndicate system." Pet. App. 86a; see Compl. ¶¶ 37-39, 45-47, 49, 54, 56. The SEC predicts that harm "will be done to the securities regulatory system" if antitrust claims may proceed based on allegations that underwriters engaged in such "permissible, regulated" joint conduct, "combined with conclusory assertions that during the course of these activities, defendants conspired to violate the law." Pet. App. 155a.

7. Plaintiffs (at 27-28) say the SEC's and NASD's judgments that immunity is necessary here evidence "capture" by the securities industry—even though the SEC and NASD pursued aggressive enforcement actions against some of the defendants. This Court recognizes "the expertise of the SEC" and "the confidence the Congress has placed in the agency," and the NASD operates under "stringent" SEC oversight. *Gordon*, 422 U.S. at 689-690; NASD Br. 1. Courts have implied immunity in every other case in which the SEC argued it was necessary, which plaintiffs concede is a fraction of the suits in which antitrust allegations overlap securities laws. The SEC's and SROs' advantages in determining whether conduct during an IPO is harmful or beneficial—long experience, sophisticated understanding of the markets, broad investigative powers, responsiveness to changing circumstances, and consistent decision-making—would be lost if underwriters instead must "reac[t] to what they see as the likely outcome of [antitrust] proceedings." *Town of Concord* v. *Boston Edison*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.).

8. Beyond hyperbolic accusations and bromides about the importance of fostering private antitrust litigation, plaintiffs

offer no reason why implied immunity doctrine should be twisted to allow duplicative actions that seek treble damages for conduct that is the subject of hundreds of suits brought by many of these same counsel under the securities laws. *IPO*, 241 F. Supp. 2d 281. Opening the courthouse doors to securities litigation dressed up in antitrust clothing frustrates Congress's intentions. Congress gave authority to regulate securities markets to the SEC and SROs, yet the ruling below shifts ultimate authority to antitrust courts and juries. Congress mandated that competition be one consideration in securities regulation, along with "efficiency," and "capital formation," yet the ruling below subjects market participants to antitrust laws the "sole aim" of which "is to protect competition." *Gordon*, 422 U.S. at 689. The Second Circuit's endorsement of using the antitrust laws to challenge conduct at the core of SEC and NASD authority also completely bypasses Congress's securities class action reforms.

Congress enacted the PSLRA to end "abuses of the class-action vehicle" that forced "extortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. "Rather than face the obstacles" created by the PSLRA, plaintiffs filed state-law class actions in state court "to avoid the federal forum." *Id.* at 1511. Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA") to close that loophole, and this Court rejected "a narrow reading" of SLUSA that "would undercut the effectiveness of the 1995 Reform Act." *Id.* at 1513. Plaintiffs now attempt another end-run by pleading securities claims as antitrust claims. Antitrust suits are subject to none of the PSLRA's procedural and discovery limitations. Pet. 29. Under the Second Circuit's narrow view of implied immunity, Congress's system for resolving private securities law suits is replaced with the "expense and delay inherent in antitrust litigation," producing "groundless claim[s]" with *in terrorem* settlement values augmented by a threat of treble damages inconsistent with the securities laws' prohibition on punitive awards. *Turner Broad.* v. *FCC*, 520 U.S. 180, 222 (1997); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 347 (2005).

9. Plaintiffs' procedural objections are meritless. This Court often reviews interlocutory antitrust decisions. *E.g.*, *F. Hoffmann-La Roche* v. *Empagran*, 542 U.S. 155 (2004); *Trinko*; *NYNEX* v. *Discon*, 525 U.S. 128 (1998); *Hartford Fire Ins.* v. *California*, 509 U.S. 764 (1993); *Summit Health* v. *Pinhas*, 500 U.S. 322 (1991). It did so in *NYNEX*, *Hartford Fire*, and *Summit Health* in the absence of any dissent or en banc review below. It reviewed reversals of dismissals in *NYNEX* and *Trinko* where defendant presented, but the lower courts did not address, alternative grounds for dismissal. *Trinko*, 123 F. Supp. 2d 738, 745 (S.D.N.Y. 2000); *NYNEX*, 1992 U.S. Dist. LEXIS 22722, at *17 n.4 (W.D.N.Y. 1992). This case is ripe for review. The clashing positions of the SEC and the DOJ are fully developed. The conflicts between the Second Circuit's ruling and decisions of this Court and other circuits are manifest. The importance of the case is documented by the SEC, NASD, NYSE and SIA. The purpose of implied immunity would be lost if review were delayed. See *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985).

10. Further percolation of the issue is unlikely. Given the Sherman Act's liberal venue provisions and centralization of the securities industry and securities lawsuits in New York, plaintiffs will file securities-related antitrust claims in the Second Circuit—a result already underway. *E.g.*, *Electronic Trading* v. *Banc of America Sec.*, 06 CV 2859 (S.D.N.Y., complaint filed Apr. 12, 2006) (charging antitrust conspiracy by broker-dealers related to commissions on short sale transactions regulated by the SEC). District courts bound by the Second Circuit's ruling will reject immunity defenses in unappealable orders denying motions to dismiss. A defendant hoping to obtain this Court's review would have to undertake the risk of a trial and treble damages award. SIA Br. 19-20. For practical purposes, this is the only opportunity this Court will have to address the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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